BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| IN THE MATTER OF KAISER ALUMINUM & CHEMICAL CORPORATION,<br><br>Appellant,<br><br>v.<br><br>PUGET SOUND AIR POLLUTION CONTROL AGENCY and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Respondents. | PCHB No. 84-44<br><br>FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

This matter, the appeal of a $250 civil penalty for opacity allegedly in violation of Department of Ecology WAC 173-415-030(4), came on for hearing before the Pollution Control Hearings Board; Gayle Rothrock, David Akana and Lawrence J. Faulk, Members, convened at Lacey, Washington on April 17, 1984. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its Staff Environmental Engineer, Paul F.

Schneil. Respondent Puget Sound Air Pollution Control Agency appeared by its attorney, Keith D. McGoffin. Respondent Department of Ecology appeared by Wick Dufford, Assistant Attorney General. The proceedings were recorded electronically.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Appellant, Kaiser Aluminum & Chemical Corporation, operates a primary aluminum plant on the tideflats in Tacoma.

II

The plant typically replaces 80 cell cathodes each year on its Potlines I and II. The routine practice is to insulate the rebuilt cell with a substance called cryolite. In this instance appellant's employee mistook alumina for cryolite and added alumina to a rebuilt cell. This resulted in higher temperature within the cell and consequent emissions to the ambient air in excess of the opacity standard provided at WAC 173-415-030(4). Appellant stipulates to this violation.

III

On the day in question, October 17, 1983, respondent Puget Sound Air Pollution Control Agency's (PSAPCA's) inspector first observed the emission at 9:46 a.m. while on routine patrol. This fact was unknown

to appellant when, at 9:55 a.m. its staff environmental engineer telephoned PSAPCA to report the emission.

IV

Respondent, Department of Ecology (DOE), has exercised its power under RCW 70.94.395 to assume regulatory control over emissions from primary aluminum plants on a statewide basis. However it has delegated certain responsibilities for enforcement to PSAPCA, including notices and orders of penalty for violations of the type involved here. The applicable rules for primary aluminum plants are set forth in DOE's chapter 173-415 WAC, including the opacity standard, WAC 173-415-030(4), cited in Finding of Fact II, above.

V

Also contained in the DOE rules for primary aluminum plants is this upset provision as amended on May 16, 1983:

> WAC 173-415-070 REPORT OF STARTUP, SHUTDOWN, BREAKDOWN OR UPSET CONDITIONS. If a startup, shutdown, breakdown or upset condition occurs which could result in an emission violation or a violation of an ambient air quality standard, the owner or operator of the source shall take the following actions as applicable:
>
> (1) For a planned condition, such as a startup or shutdown, the condition shall be reported to the department, or its delegated authority, in advance of its occurrence.
> (2) For an unplanned condition, such as a breakdown or upset, the condition shall be reported to the department, or its delegated authority as soon as possible.
>
> Upon request of the department or its delegated authority, the owner or operator of the source shall submit a full written report including the known causes, the corrective actions taken, and the preventive measures to be taken to minimize or eliminate the chance of recurrence.

> Compliance with the requirements of WAC 173-415-070, does not relieve the owner or operator of the source from the responsibility to maintain continuous compliance with all the requirements of chapter 173-415 WAC nor from the resulting liabilities for failure to comply.

VI

On December 29, 1983, appellant received a Notice and Order of Civil Penalty from PSAPCA imposing a civil penalty of $250. From this, appellant appeals. Appellant's Notice of Appeal was filed January 23, 1984.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

Appellant caused emissions in violation of WAC 173-415-030(4), opacity, on October 17, 1983.

II

The evidence establishes that this incident was avoidable and that the amount of penalty was reasonable.

III

The upset provision, WAC 173-415-070, as amended on May 16, 1983, is merely a notice provision and does not contain any basis for excusing an incident which is otherwise a violation.

IV

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The $250 civil penalty is affirmed.

DONE at Lacey, Washington this 25th day of April, 1984.

POLLUTION CONTROL HEARINGS BOARD

Gayle Rothrock
GAYLE ROTHROCK, Chairman

David Akana
DAVID AKANA, Lawyer Member

(See Dissenting Opinion
LAWRENCE J. FAULK, Vice Chairman

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

DISSENTING OPINION - Lawrence J. Faulk, Vice Chairman
PCHB No. 80-44

I respectfully dissent from the majority opinion. It seems to me that appellant complied with the notification requirements in WAC 173-415-070 and therefore should not be assessed a penalty.

The record shows that on October 17, 1983, at approximately 9:46 a.m. a mix-up occurred in the chemical components used in Pot #47 of Line #2 of Kaiser's Tacoma plant. It also indicates that appellant notified PSAPCA (9:55 a.m.) prior to being contacted by PSAPCA (10:30 a.m.). On October 18, 1983, appellant phoned PSAPCA and explained the problem. On October 26, 1983, appellant submitted a full written report to PSAPCA explaining the cause of this accident. Therefore, in my view they should not be fined.

I also question the reasonableness of the rule WAC 173-415-070. DOE maintains that the rule is in accordance with the Clean Air Act adopted by the Washington State Legislature. I disagree.

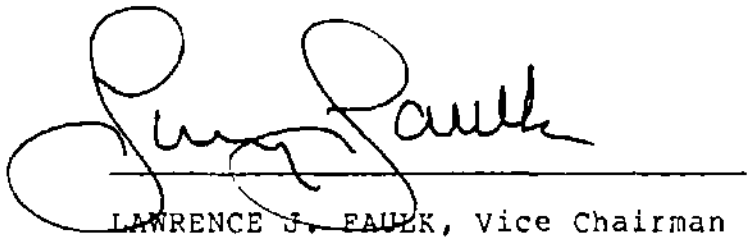
It is true that the Clean Air Act is a strict liability statute. However as a member of the Washington State Senate when that statute was adopted in 1967, it never occurred to me there would be no excuse from a penalty for an unforeseen accident or breakdown. But that is precisely how the WAC rule has been adopted by DOE.

In my view, it is unreasonable for government to adopt a rule that does not allow citizens to be excused from a penalty if a valid breakdown or upset condition occurs.

As a result of WAC 173-415-070 rule and the planned adoption by PSAPCA of this rule in place of the 9.16 provision in Regulation I, this Board is precluded from interpreting and applying this provision in a manner that furthers justice, as it has done in the past decade.

The legislature will be disappointed, I think, to learn that in enacting the Clean Air Act and subsequent amendments, it was allowing a government agency to adopt a rule which does not have an "escape valve" which excuses the citizen from being fined because of an accident or a breakdown. And I think its disappointment will continue unabated when it discovers that this same rule has removed the authority from this Board to make that judgment.

I believe WAC 173-415-070 should be declared invalid by this Board.



LAWRENCE J. FAULK, Vice Chairman